(2)

Supreme Court, U.S.
FILED
JAN 5 2001
CLERK

No. 00-799

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

G. RANDALL GARROU
Counsel of Record
WESTON, GARROU & DEWITT
12121 Wilshire Blvd.
Suite 900
Los Angeles CA 90025-1176
(310) 442-0072

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding unconstitutional an ordinance prohibiting adult video viewing machines from operating within adult bookstores where the ordinance prohibited such unitary businesses even though any asserted secondary effects caused by such businesses were presumably already ameliorated by the fact that such stores had to be located in specified commercial or industrial districts, and had to comply with, and did comply with, all *adult* zoning restrictions, including the requirement that such a store not operate within 500 feet of any church, school, park or residential zone, nor within 1,000 feet of any other adult entertainment business?

2. Did the Court of Appeals err in finding unconstitutional an ordinance prohibiting adult video viewing machines from operating within adult bookstores where the only type of secondary effects relied upon by the City were those assertedly caused by a *clustering* of multiple unrelated adult businesses, and the legislative record failed to show reliance on any studies which suggested that the secondary effects of such businesses varied depending on the number or type of separately defined adult use activities occurring within any one such business?

3. Did the Court of Appeals err in finding unconstitutional an ordinance prohibiting adult video viewing machines from operating within adult bookstores where the legislative record showed no greater secondary effects being caused by adult bookstores containing video viewing booths than caused by businesses consisting solely of video viewing booths?

QUESTIONS PRESENTED – Continued

4. Did the Court of Appeals err in finding unconstitutional an ordinance prohibiting adult video viewing machines from operating within adult bookstores where there was substantial evidence showing that such machines had existed for many years within traditional adult bookstores, and there was no evidence that such machines had ever been operated or existed as an independent stand-alone business, nor was any evidence submitted showing that a separate business consisting solely of such machines could likely survive?

5. Did the Court of Appeals err in finding unconstitutional an ordinance prohibiting adult video viewing machines from operating within adult bookstores where the uncontroverted evidence showed that respondents' adult bookstores offered many thousands of adult videotapes for rental or purchase for home viewing, and also allowed customers, for a fee, to preview any of those video tapes in the video machines before rental or purchase, and where there was no other method by which consumers could, as effectively, obtain truthful information about the contents of individual videotapes, to assist them in deciding which ones to purchase or rent for home viewing?

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	8
A. Almost No Other Jurisdictions Have An Ordinance Like The One Stricken By The Court Of Appeals	8
B. No Significant Conflict Among The Circuit Courts Of Appeals Merits This Court's Review	9
C. Contrary To The City's Assertion, The Opinion Of The Court Of Appeals Does Not Conflict With This Court's Decision In *Renton*	10
CONCLUSION	14

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alameda Books v. City of Los Angeles,
222 F.3d 719, 722 (9th Cir. 2000) 11

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) ..... *passim*

Colacurcio v. City of Kent,
163 F.3d 545 (9th Cir. 1998) 10, 11

Dumas v. City of Dallas,
648 F.Supp. 1061 (N.D.Tex. 1986) 9

Edenfield v. Fane,
507 U.S. 761 (1993) 9

Hart Book Stores, Inc. v. Edmisten,
612 F.2d 821 (4th Cir. 1979) 8, 9, 10

Turner Broadcasting System v. F.C.C. (Turner II),
520 U.S. 180 (1997) 9

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 9, 11

CONSTITUTIONAL PROVISIONS

First Amendment 15

ORDINANCES

Los Angeles Municipal Code

§ 12.70C 7, 8

§ 103.101 7

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents Alameda Books, Inc. and Highland Books, Inc., adopt the Statement of the Case presented by the City of Los Angeles in its Petition for Writ of Certiorari except to the extent specifically noted below:

1. The City asserts that "[t]he 1977 study documented that the concentration of adult entertainment businesses resulted in increased crime, decreased property values, and generally caused blight and other negative impacts in the neighborhoods where they concentrated." Pet. at 3. The City's assertion is materially inaccurate.

First, the 1977 study (the "study") did *not* document that a concentration of adult entertainment businesses results in decreased property values. In fact, the Study showed the exact opposite. The 1977 study measured the changes in property values over time in five selected areas where there were concentrations of adult businesses. In each of those five areas, property values *increased*. Additionally, the City's 1977 study compared the rate of increase in those five test areas to five "control" areas in the same general part of town but without adult businesses. The study found that property values in two of the five areas with adult business concentrations increased *more rapidly* than in the respective control areas where there were no adult businesses. The City's own study ultimately concluded that it did *not* support the

assertion that adult businesses caused decreased property values.

Second, the study did not fairly demonstrate that adult businesses cause increased crime. The study merely noted that, over a one year period, the Hollywood area had a higher incidence of crime than the entire City of Los Angeles. Because there was a higher concentration of adult businesses in Hollywood than other parts of the City, the study jumped to the conclusion that the adult businesses were the *cause* of the slightly increased crime rate. The study made no attempt to pinpoint which features of Hollywood might account for the slightly increased crime rate, but simply *assumed* that the adult businesses were the primary cause.[1]

---

[1] For example, Hollywood, which is simply a district within the City of Los Angeles, is one of the city's most concentrated areas for live entertainment of all types, as well as one of its most heavily commercial areas. It is entirely possible that commercial areas generally have higher rates of crime than the City at large. It is also possible that areas which attract large numbers of tourists and feature numerous restaurants and non-adult motion picture theaters have higher crime rates than the overall crime rates of the entire City.

Likewise, Hollywood has considerably older structures than the City average, and it also has a far greater percentage of transients. There is also a greater percentage of persons living in poverty in the Hollywood area than the City average.

None of these possibilities were considered by those drawing conclusions in the 1977 study, even though any one of those factors could be an equally plausible basis to explain Hollywood's higher crime rate, and certainly, the combination of *all* of them would provide a far more plausible explanation for the slightly higher crime rate in Hollywood than the rest of the City.

In any event, the study's reported heightened crime rate in Hollywood included numerous urban crimes not generally associated with adult businesses, such as forgery, counterfeiting, embezzlement, fraud, and suicide. Moreover, the study provided no data to indicate that these crimes were occurring *inside* any adult entertainment business, nor did the study examine the issue of whether any particular *combinations* of adult business uses were likely to increase the frequency of such crimes in the surrounding areas.

Finally, to the extent that the study attempted to enumerate the various types of adult entertainment businesses then existing in Los Angeles, it did not include or find any stand-alone businesses called "adult arcades." Instead, the only so-called "adult arcades" were those found to exist as integral component parts of existing adult bookstore businesses.

2. In discussing the motivations for enactment of the 1983 ordinance amendment which established the provision challenged in this case, the City asserts that "it was discovered" that the measurement of distance provision "was being interpreted in such a manner as to permit a combination of such businesses to be located within the exterior structural walls of a single building at one site." Pet. at 5. This is somewhat misleading. The 1983 Staff Report that suggested the need for a modification of the ordinance was merely an observation that the City's own Building and Safety Department routinely construed and interpreted the 1978 ordinance as posing no bar to an adult bookstore's including individual viewing booths as part of a single integrated business. This tends to suggest

that, prior to enactment of the 1983 ordinance, city officials did not contemplate the type of restriction which would later be added by the 1983 amendment here under review, notwithstanding the self-serving, unsupported and seemingly false language to the contrary found in the statement of purpose for the 1983 amendment.

3. The City has omitted the following potentially relevant facts of record from its discussion of the operation of the two respondents' businesses:

a. Both Highland Books and Alameda Books are relatively small retail stores. The area open to the general public in the two businesses is approximately 2,500 and 3,000 square feet, respectively.

b. Both Alameda Books and Highland Books sell and rent sexually oriented products, including videotapes, and both stores provide video viewing booths in which, for a small fee, customers can view or preview the many thousands of different videotapes that are available for sale and/or rental in the store.

c. The method of operation of the two stores is virtually identical. During most of the hours of operation, a single employee works at the store, a counter clerk who "rings up" retail sales and supervises operation of the store's video viewing booths. That employee also gives change and checks identification to ensure that no minors gain access to sexually-oriented materials.

d. The video viewing booths and retail sales areas of both stores are located in the same commercial space within a single building. In Alameda Books, no walls separate the video viewing booths from the retail portion of the premises. In Highland Books, the video booths,

while in the same store as the retail sales, are in a somewhat separated portion of the store connected to the retail sales by a common interior entrance way.

e. In each store, one manager (or clerk) supervises the entire location. There is only one entrance/exit door (other than emergency exits) to the entire store. That entrance is the only access from the outside to either the video booths or the retail sales areas of the store. Customers may freely walk about the premises, entering and exiting the video viewing booths and browsing through the store.

f. Both Highland Books, Inc. and Alameda Books, Inc., are the sole owners and operators of the entirety of each respective business, including both the retail sales and rental aspects of the stores and the video arcade portion of the store.

g. Alameda Books has 15 video viewing booths. Highland Books has 19 video viewing booths.

h. After a customer has watched the videos of his or her choice in the video viewing booths, the customer can then go to the clerk on duty and purchase or rent any of the videos in the store.

i. Both Alameda Books and Highland Books carry approximately 6,500 different titles of sexually oriented videotapes for rental or retail sale. Both stores allow customers to view or preview *any* of these thousands of video tapes in the store's video preview booths. Specifically, a customer who is interested in a particular videotape may bring it directly to the counter clerk and request to preview it. After paying a small fee to the counter clerk, the customer is then directed to one of the video

preview booths, and the clerk activates that videotape. After viewing the tape in the preview booth, the customer may elect to either purchase or rent it for subsequent home viewing.

j. At all relevant times, there has existed in both Highland Books and Alameda Books a prominently displayed commercial sign which, in pertinent part, states the following to all customers:

> "ALL VIDEOS IN THIS STORE ARE AVAILABLE FOR RENT, PREVIEW, AND/OR SALE. A CASH, VISA OR MASTERCARD DEPOSIT EQUAL TO THE PRICE OF THE VIDEO IS REQUIRED."

k. In both Highland Books and Alameda Books, and on a regular basis, customers who have viewed a videotape in one of the video viewing booths will proceed to either rent or purchase one of the videos they have just previewed.

4. The uncontroverted facts of record established that there is no such thing as an "adult arcade business" which exists in the real world independent of some other primary business such as an adult bookstore.

5. Previewing adult videotapes in the store where they are available for purchase or rental is the best source of consumer information regarding the content of such videos. One significant practical effect of the challenged ordinance is to entirely ban all video viewing and previewing machines from adult book and video stores throughout Los Angeles, and thereby deprive the public of the best available source of truthful information for making decisions about which videotapes to purchase or rent.

6. Respondents' "waiver" was slightly more limited than its characterization by the City. Pet. at 8. By virtue of

a previous discovery agreement with the City, respondents agreed they would put on no evidence to show that adult arcades could not survive independent of an adult bookstore, and further agreed that they would not affirmatively assert or attempt to prove that no adult arcade can survive economically, unless operated in conjunction with an adult bookstore on the same premises. However, respondents have always taken the position that it is the *City's* burden, in order to present a *prima facie* defense, to affirmatively establish that its ordinance would not unduly restrain expression, and to show that it has defined as an independent adult use a type of business which in fact *exists* (or at least which *could* exist) in the real world. Consequently, respondents never stipulated that they would refrain from arguing that the City has the burden of proof on this issue, nor did respondents agree to refrain from arguing that the City has failed to affirmatively show that such businesses could in fact survive as independently operating businesses. In fact, the City presented no evidence whatsoever on this point.

7. L.A.M.C. § 103.101, which became effective on November 7, 1977, places additional restrictions on businesses containing video viewing booths, including that the booth have a prescribed level of illumination and that the interior of each booth be entirely visible. The potentially ameliorating impact of that ordinance on any potential adverse secondary effects is not reflected in the City's 1977 study, which had concluded by June of 1977.

8. Currently, L.A.M.C. § 12.70C also prohibits adult businesses, including adult arcades, from operating within 500 feet of "a religious institution, school, or public park within the City of Los Angeles," and also within

500 feet of "any lot in an 'A' [agricultural] or 'R' [residential] zone, or within the 'CR', 'C1', or 'C1.5' [limited commercial] zones in the City of Los Angeles."

9. Both of respondents' businesses are properly situated in commercial zones and comply with all of the locational restrictions of L.A.M.C § 12.70C other than the one challenged herein (i.e., neither business is within 500 feet of any church, school, park or residential or agricultural zone, nor within 1,000 feet of any other adult entertainment business).

REASONS FOR DENYING THE WRIT

A. Almost No Other Jurisdictions Have An Ordinance Like The One Stricken By The Court Of Appeals.

Among many other reasons, this Court need not address the validity of the Los Angeles ordinance here under review as it is one of very few of its type throughout the entire nation.

Prior to the opinion in this case, the only other published opinion involving a similar ordinance was over 20 years ago.[2] Although an ordinance similar to this one was approved in *Hart*, in the intervening 21 years, no other published opinion has analyzed such an ordinance. The primary reason for this seems to be that local governments simply have not embraced this rather peculiar regulation, likely because it does nothing to further any

[2] *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979).

governmental interest. Indeed, the only other opinion which even *mentions* such an ordinance is *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1071, n.25 (N.D.Tex. 1986), where the court notes that, even though Dallas had an ordinance similar to this one, city officials had construed it so as to permit "one business to deal in several different media." *Id.* In short, nothing in the record suggests that ordinances as restrictive as the one in this case are in widespread circulation or are anything other than aberrations. Accordingly, there would appear to be no pressing need for this Court to address their constitutionality.

B. No Significant Conflict Among The Circuit Courts Of Appeals Merits This Court's Review.

Although there is one Court of Appeals decision reaching a *result* contrary to this one,[3] that 1979 ruling was issued prior to numerous significant decisions of this Court which bear on the proper mode of analysis of such ordinances. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (articulating use of time, place and manner test when analyzing adult zoning ordinances); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (supplying gloss on correct application of time, place and manner test); *Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180 (1997) (articulating elements of the test of "intermediate scrutiny" to be used in First Amendment cases involving content-neutral legislation); and *Edenfield v. Fane*, 507 U.S. 761 (1993) (articulating relevant elements of rapidly evolving test for commercial speech).

[3] *Hart, supra.*

Given that *none* of these significant rulings was available to guide the 1979 court deciding *Hart*, a conflict solely between *Hart* and the current case is hardly one needing to be addressed by this Court.

Again, if this were in fact an issue of burning concern among the circuits, there would no doubt have been other cases analyzing such an ordinance in the last 21 years than the one referenced in the City's Petition.

C. Contrary To The City's Assertion, The Opinion Of The Court Of Appeals Does Not Conflict With This Court's Decision In *Renton*.

The City claims that "[t]he opinion of the Court of Appeals deals with an issue of federal constitutional law in a way which directly conflicts with this Court's decision in *Renton*." Pet. at 10. That is simply not so.

In *Renton*, this Court upheld an adult zoning ordinance and specifically held that the appropriate test for analyzing such a restriction should be the First Amendment's familiar test for analyzing "time, place and manner regulation[s]." 475 U.S. at 46. That is precisely what the Court of Appeals utilized to analyze the challenged Los Angeles ordinance in the present case.

Indeed, the Court of Appeals adopted the formulation of the time, place and manner test it most recently articulated in *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998), *cert. den'd*, ___ U.S. ___, 120 S.Ct. 1553, 146 L.Ed.2d 459 (2000), where it *upheld* very strict restrictions

on adult entertainment businesses. Specifically, the *Colacurcio* test, as approved and articulated by the Court of Appeals' opinion herein, is as follows:

> "[M]unicipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information."

Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719, 722 (9th Cir. 2000), *quoting Colacurcio v. City of Kent* (163 F.3d at 551), citing in turn, to this Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

The opinion below is also consistent with the more specific guidance this Court provided in *Renton* for applying the time, place and manner test in adult business cases. While *Renton* made clear that a city need not conduct its own studies "or produce evidence independent of that already generated by other cities," it nonetheless required that "whatever evidence the city relied upon" must be found to be evidence which "is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52.

While the City reads *Renton* as giving municipalities carte blanche to enact limitless time, place, and manner restrictions on adult businesses short of a total prohibition, *Renton* did not go nearly so far and, indeed, its insistence that it was applying the traditional "time, place and manner" test suggests that any such interpretation of *Renton* would be wholly at odds with *Renton's* express language.

In any event, the Court of Appeals, guided by the express mandate in *Renton*, required the City to make at least a minimum threshold showing, i.e., it required the City to establish that it relied upon evidence which it "reasonably believed to be relevant to the problem that the city addresses." *Id.*

Most of the City's briefing and oral argument before the Court of Appeals asserted that the City's 1977 study supplied the requisite evidence which the City then was entitled to "reasonably believe" supported its ordinance. However, the Court of Appeals looked closely at that entire study and concluded that, while the 1977 study supported the significant separation requirements between autonomous adult businesses imposed by the City's original 1978 adult zoning ordinance, the 1977 study did not provide any reasonable basis for the drastic 1983 expansion of those restrictions to prohibit adult bookstores from continuing to operate if one or more adult video viewing booths were situated on the premises.[4] This was an eminently fair and reasonable reading of the legislative record, as the City's 1977 study never made any attempt to evaluate whether independently operating "multiple-use" adult businesses created any greater adverse secondary effects on the surrounding community than other adult entertainment businesses

[4] Taking the City's argument to its unavoidable and inevitable conclusion, it could prohibit a single business use from selling more than one category of item, thus requiring a separate retail outlet for adult books, another for adult magazines, another for adult videotapes, and so on.

which fit into only one of the arbitrarily[5] defined adult business categories established by the City's ordinance scheme.

Neither did the City Council rely on such studies of any other city. There are none.

The City has now apparently recognized the futility of attempting to establish a "reasonable basis" for enactment of the 1983 ordinance in its 1977 study. Accordingly, it has now shifted its focus before this Court and asserts the alternative proposition, barely mentioned in the lower courts, that its current ordinance can instead be justified based upon studies of *other* cities or, alternatively, based upon judicial opinions recognizing and adopting such studies. Quite apart from the fact that the City barely even mentioned this issue in the court below, there simply is no conflict between the Court of Appeals' ruling and this Court's *Renton* decision even when measured from the perspective of this newly-pressed alternative theory.

Specifically, *Renton* states that the evidence upon which a city relies in enacting an ordinance must be "reasonably believed to be relevant to the problem that the city addresses." 475 U.S. 51-52. However, even to the extent that *Renton* allows a city to rely on judicial opinions endorsing the results of other studies, the plain fact is that the Los Angeles City Council, in 1983, could not

[5] The word "arbitrarily" is used above because the record shows that the City was acting arbitrarily in defining an adult business called an "adult arcade" as no such business had ever in fact existed in the real world as a discrete and independent business.

have relied on any studies or judicial opinions rendered *after* 1983. Accordingly, under the test of *Renton*, the only issue is whether there were sufficient studies or judicial opinions in effect prior to 1983, and upon which the City Council in fact relied when enacting the challenged ordinance, to allow the ordinance to pass muster under the time, place and manner test articulated in *Renton*.

However, the City's Petition describes no studies whatsoever (whether in fact considered by the City Council or not) which compared the secondary effects of so-called "multiple-use" adult entertainment businesses to those of "single use" adult entertainment businesses.

Neither does the City's Petition cite any judicial opinions upon which the 1983 City Council relied which opinions had examined and/or endorsed the results of any such studies. Rather, it is clear from the record that the *only* thing considered by the 1983 City Council was the City's 1977 study. Thus, neither the District Court nor the Court of Appeals erred in concluding that that study did not supply a reasonable basis for the drastic expansion of the 1978 restrictions which was stricken below by the Court of Appeals.

CONCLUSION

The ordinance here stricken is not one in widespread use and there is no significant conflict in the lower courts regarding the constitutionality of such an ordinance. Neither is it an ordinance shown to be at all necessary or valuable for protection of the public.

In contrast, there are numerous alternative First Amendment problems with this ordinance which the Court of Appeals was not even required to address which would have independently warranted invalidation of this ordinance. For example, if this ordinance were upheld, it would deprive the public of considerable First Amendment access, effectively preventing not only on-premises viewing of all sexually oriented videotapes in the primary facilities where such products are available, but also preventing the public from the best source of truthful information needed to assist it in making informed decisions about which videotapes to purchase or rent.

Likewise, the ordinance would also be subject to First Amendment challenge for arbitrarily carving up existing unitary expressive businesses into component parts which had never independently existed, and which had not been shown to be capable of independent existence. The principle underlying this type of ordinance, if accepted by the court below, would allow the absolute destruction of any adult bookstore business, simply by arbitrarily defining the sale of each of its wares as separate adult "businesses" which may not occur in the same store.

Lastly, of course, the basis chosen by the Court of Appeals for invalidation of this ordinance was entirely consistent with this Court's mandate in *Renton* that, at a constitutional minimum, cities enacting time, place and manner restrictions of adult businesses must at least show that they relied upon evidence "reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52. The City did not do that here.

For all the reasons above, there is neither any pressing conflict needing to be resolved, nor any opinion which strays from the principles adopted by this Court in *Renton* which would warrant issuance of a writ of certiorari.

DATED: January 5, 2001

Respectfully submitted,

G. RANDALL GARROU
WESTON, GARROU & DEWITT
By G. RANDALL GARROU

Attorneys for Respondents